SUPREME COURT, U. S.

JUL 14 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 364

ST. JOE PAPER COMPANY,

Petitioner,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Chester Bedell
C. Harris Dittmar
Attorneys for Petitioner
1520 Barnett Bank Building
Jacksonville, Florida 32202

INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Rule of Civil Procedure Involved	2
Statement of the Case	3
Reasons for Granting Writ	6
Conclusion	8
Appendix - Opinions and Judgments Below	9

CITATIONS

CASES:	Page
American Surety Co. v. *Pauly* (1898), 170 U.S. 133	7
Curran & Treadaway, Inc. v. *American Bonding Co. of Baltimore,* (1939), 193 La. 763, 192 So. 335	7
Gallon v. *Lloyd-Thomas Co.* (8th Cir. 1959), 264 F.2d 821, 77 A.L.R. 2d 417	6
Hartford Accident & Indemnity Co. v. *Singer* (1946), 185 Va. 620, 39 S.E. 2d 505	7
Henry v. *Coahoma County Board of Education* (5th Cir. 1965), 353 F.2d 648, *cert. den.* 384 U.S. 962	6
Kuhn v. *Civil Aeronautics Board* (D.C. Cir. 1950), 183 F.2d 839	7
Standard Title Insurance Company v. *Roberts* (8th Cir. 1965) 349 F.2d 613	6
United States Fidelity & Guaranty Co. v. *Constantin* (Miss. 1963), 157 So.2d 642	7
FEDERAL RULE OF CIVIL PROCEDURE:	
Rule 15(b)	2, 6
STATUTES:	
15 U.S.C., §§ 13, 13a	4
MISCELLANEOUS:	
1A Federal Practice and Procedure, Sec. 449	7
3 Moore's Federal Practice, Sec. 15.13[2]	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 196[illegible].

No. _____

ST. JOE PAPER COMPANY,

Petitioner,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

St. Joe Paper Company prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 18, 1967.

Citations to Opinions Below

The judgment of the District Court (R. 797) is unreported and is printed in the appendix hereto, *infra*, p. 9. The opinions of the Court of Appeals are reported in 359 F.2d 579 and 376 F.2d 33, and are printed in the appendix hereto, *infra*, p. 10.

Jurisdiction

The judgment of the Court of Appeals was entered on May 3, 1966 (p. 10, infra). The judgment was modified on rehearing on March 28, 1967 (p. 21, *infra*) and petition for further rehearing was considered on its merits and denied on April 18, 1967 (p. 25, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

The questions presented are:

1. Whether a court may submit an issue to the jury that had been eliminated as a defense and not conceded to be or recognized as an issue in the case by the parties.

2. Whether an employer's knowledge or information of *any* fraudulent or dishonest act on the part of an employee will defeat coverage under a fidelity bond regardless of whether that act would give rise to a claim under the policy.

Rule of Civil Procedure Involved

The Federal Rule of Civil Procedure involved is Rule 15(b) which provides in pertinent part:

> " (b) When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment;

but failure so to amend does not affect the result of the trial of these issues."

Rule 15(b), Federal Rules of Civil Procedure.

Statement of the Case

This petition raises important questions of federal procedure and due process of law, concerning the submission to a jury of an issue that had been stricken as a defense to the action and that was not tried with either the express or implied consent of the petitioner.

St. Joe Paper Company, petitioner here, filed suit in the District Court for the Middle District of Florida against Hartford Accident and Indemnity Company and The Fidelity and Casualty Company of New York upon their policies of fidelity insurance to recover over $86,000 lost by St. Joe through the fraudulent and dishonest acts of Robert M. Jones, one of its employees. Jurisdiction of the District Court was based on diversity of citizenship.

The stipulated facts show that between August 5, 1959, and February 16, 1961, St. Joe transmitted to Box Sales Agency commission checks in an aggregate amount exceeding $86,000 upon the representation of Jones that such commission payments were necessary to retain the business of Anchor Hocking Glass Corporation. The stipulated facts also show that the checks sent to Box Sales Agency were removed by Jones from a post office box maintained by him in the name of Box Sales Agency, endorsed by him with a rubber stamp, deposited in the Box Sales Agency bank account and then transferred by Jones to his personal bank account (R. 116-138).

In their answers, the respondents averred that St. Joe could not recover on the fidelity bonds because it had knowledge or information of the fraudulent and dishonest acts alleged in the complaint (R. 19-21). At the pretrial conference, the respondents filed additional affirmative defenses, the gravamen of which was that St. Joe was barred from recovery because it had knowledge or information that Box Sales Agency probably consisted of persons employed by or connected with Anchor Hocking's purchasing department and thus had knowledge that Jones, in causing payments to be made to Box Sales Agency, had committed a fraudulent or dishonest act, to wit: commercial bribery in violation of the Robinson-Patman Act, 15 U.S.C., §§ 13, 13a (R. 25, 30-31).

These defenses were stricken by the Court (R. 75) and the case went to trial on the simple issue of whether St. Joe knew that the Box Sales Agency checks were being received by Jones. Relying upon the rulings of the trial judge ["after I struck your Robinson-Patman Act and those additional defenses, it seems to me to be a simple issue" (R. 110), "Robinson-Patman and all that went out the window. . . . As a defense." (R. 82); "Robinson-Patman is out. That is not getting in at all." (R. 84)] St. Joe considered the question of its suspicion or belief that the commission payments were being transmitted to Anchor Hocking or its personnel had been eliminated from the case and did not attempt to show that there was no factual basis for such suspicion or belief.

Nevertheless, over objection, the Court charged the jury that:

> ". . . if you find from the evidence that prior to August 5, 1960, St. Joe Paper Company knew through one or more of its officers or one or more of its officers were informed . . . that all or a part of the commissions

> were being transmitted . . . to Anchor Hocking Glass Corporation or to persons connected with Anchor Hocking Glass Corporation . . . you must return a verdict for defendants."
>
> R. 782.

The jury returned a verdict for both respondents (R. 796) and petitioner appealed, assigning as error the giving of the quoted instruction.

The Court of Appeals for the Fifth Circuit, in its first opinion (359 F.2d 579), held that "this instruction comprehends a correct statement of the law" (359 F.2d at 583) and that, even though the defenses involving this issue were stricken "this does not change the fact that the evidence as adduced by the parties, under the supervision of the court, developed this issue and the defendants were entitled to have it submitted to the jury." 359 F.2d at 584.

Holding that the District Judge properly denied petitioner's motion for a directed verdict and that the jury's verdict for respondents was sustained by the evidence, the Court of Appeals quoted and relied on testimony that was proffered at the trial but never heard by the jury. On rehearing (376 F.2d 33), the Court struck from the opinion its references to such testimony and its holding that "this instruction comprehends a correct statement of the law." In lieu thereof, the Court said: "it is not necessary to determine whether this instruction is a correct statement of the law . . ." (376 F.2d at 34) because St. Joe had not objected to the instruction in such manner as to entitle it to assign the giving of the instruction as error.

On petition for further rehearing, the Court of Appeals handed down a third opinion in the case (376 F.2d 35), now

conceding that it must consider the merits of plaintiff's objection to the instruction but reverting to its original holding that the instruction was proper.

Reasons for Granting the Writ

The decision of the Court of Appeals, sustaining the submission to the jury of the issue that had been eliminated as a defense and not conceded to be or recognized as an issue, sanctioned such a departure from the accepted and usual course of judicial proceedings as to require this Court to exercise its power of supervision.

It is well settled that instructions to the jury should be confined to the pleadings in the case and the facts developed by the evidence in support of those pleadings and that a court may not submit to the jury an issue not made by the pleadings unless that issue has been tried with the express or implied consent of the parties, Rule 15(b), Federal Rules of Civil Procedure.

There can be no implied consent to try an issue when the parties do not squarely recognize it as an issue in the trial. 3 Moore's Federal Practice, § 15.13[2], p. 992 (2d ed.). A party cannot be held to have impliedly consented to trial of a new issue where the evidence received in support of that issue is relevant to some other issue already in the case, *Gallon* v. *Lloyd-Thomas Co.* (8th Cir. 1959), 264 F.2d 821, 77 A.L.R.2d 417; *Standard Title Insurance Company* v. *Roberts* (8th Cir. 1965), 349 F.2d 613. Moreover, it is essential, under Rule 15(b) and the guarantee of due process of law, that the party who is held to have consented to try an issue, have fair notice that a new issue has been raised by the evidence, *Henry* v. *Coahoma County Board of Education* (5th

Cir. 1965), 353 F.2d 648, *cert. den.* 384 U.S. 962 [adopting the opinion of the district court (N.D. Miss. 1963), 246 F.Supp. 517]; *Kuhn* v. *Civil Aeronautics Board* (D.C. Cir. 1950), 183 F.2d 839; 1A Federal Practice and Procedure, § 449, pp. 787, 792 (Rules ed.).

Petitioner never recognized or had fair notice that the respondents would have before the jury the benefit of the stricken defense based on the supposed knowledge or information that the commission payments were being transmitted to Anchor Hocking or its personnel. Petitioner's position was, and is, that in order to terminate coverage under a fidelity bond an employer must have knowledge or information of a specific fraudulent or dishonest act for which a claim can be made by the insured, *American Surety Co.* v. *Pauly* (1898), 170 U.S. 133. And suspicion or belief that St. Joe was paying a sales commission to Anchor Hocking or its personnel in violation of the Robinson-Patman Act or otherwise did not constitute knowledge of a specific fraudulent or dishonest act of an employee that would terminate coverage.

The Court of Appeals' holding, that knowledge or information of *any* fraudulent or dishonest act on the part of an employee terminates coverage, is contrary to the reported cases on the point. The cases relied upon by the petitioner cannot be distinguished on the ground that the terms of the two policies in the instant case are "much broader than the somewhat similar provisions which have been construed to limit the exclusion to fraudulent or dishonest acts which would give rise to a claim under the policy" (376 F.2d at 35). See *Curran & Treadaway, Inc.* v. *American Bonding Co. of Baltimore* (1939), 193 La. 763 ,192 So. 335; *United States Fidelity & Guaranty Co.* v. *Constantin* (Miss. 1963), 157 So.2d 642; *Hartford Accident & Indemnity Co.* v. *Singer* (1946), 185 Va. 620, 39 S.E.2d 505.

The Court's holding that knowledge or information of *any* fraudulent or dishonest act will defeat coverage under a fidelity bond is not only erroneous but will severely limit recoveries on fidelity bonds. The decision disregards the general rule that insurance policies are strictly construed against the insurer and that forfeiture provisions are not favored by the courts. The insurance companies only insure against certain types of fraudulent and dishonest acts of employees. The law does not permit them to defeat recoveries on their fidelity bonds because of knowledge or information by the employer of acts or conduct on the part of employees that would not come within the coverage of the fidelity bonds.

Conclusion

The decision of the Court of Appeals sanctions and was itself a departure from the accepted and usual course of judicial proceedings in approving the giving of an instruction on an issue not made by the pleadings, not tried by the implied consent of the parties and erroneous as a matter of law.

Wherefore, petitioner prays this Court to grant its writ of certiorari to review the decision of the Court of Appeals and to reverse the decision of the Court of Appeals.

Respectfully submitted,

.....

(Chester Bedell)

.....

(C. Harris Dittmar)

Attorneys for Petitioner.

INDEX TO APPENDIX

Page

Judgment in the United States District Court (Filed June 23, 1964) 9

Opinions and Judgment in the United States Court of Appeals:

Opinion, 359 F.2d 579 10

Opinion On Rehearing, 376 F.2d 33 21

Opinion On Petition For Further Rehearing, 376 F.2d 35 25

Judgment entered on March 28, 1967, Issued as Mandate on April 26, 1967 27

APPENDIX

IN THE
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

JUDGMENT
(filed June 23, 1964)

This action came on for trial before the Court and a jury, Honorable WM. A. McRAE, JR., United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

That the Plaintiff take nothing, that the action be dismissed on the merits, and that the defendants HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation recover of the Plaintiff ST. JOE PAPER COMPANY, a corporation, its costs of action.

Dated at Jacksonville, Florida, this 23rd day of June, 1964.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22129

ST. JOE PAPER COMPANY,

Appellant.

versus

HARTFORD ACCIDENT AND INDEMNITY COMPANY, ET AL.

Appellees.

Appeal from the United States District Court for the Middle District of Florida.

(May 3, 1966.)

Before PHILLIPS,* RIVES, and COLEMAN, Circuit Judges.

COLEMAN, Circuit Judge: Suit was brought on two fidelity insurance policies of substantially identical provisions, issued for different periods by different companies to the same employer. Trial to a jury resulted in a general verdict for both defendants and there was judgment accordingly. We affirm.

---

* Of the Tenth Circuit, sitting by designation.

I

The policy issued by the Hartford Accident and Indemnity Company was for the term beginning August 5, 1959, and expiring August 5, 1960. The loss claimed against this policy amounted to $49,137.61. The policy issued by the Fidelity & Casualty Company of New York was for the period elapsing between August 5, 1960, and February 16, 1961, with an alleged loss of $36,941.

The policies agreed to indemnify the plaintiff against any *loss of money* which it should sustain "through any fraudulent or dishonest act or acts committed by any of the Employees, acting alone or in collusion with others".

While, as above stated, there were two policies issued by different companies for different periods, appellant says in its brief that each policy, in nearly identical language, contained the following provisions:

1. "The coverage * * * shall not apply * * * from and after the time that the Insured or any partner or officer thereof not in collusion with such Employee shall have knowledge or information that such Employee has committed any fraudulent or dishonest act in the service of the Insured or otherwise, whether such act be committed before or after the date of the employment by the insured";
2. "This Bond shall be deemed cancelled as to any Employee: (a) immediately upon discovery by the Insured, or by any partner or officer thereof not in collusion with such Employee, of any fraudulent or dishonest act on the part of such Employee."

II

The prelude to this law suit ran for nearly five years. The

alleged infidelity was a two year continuation in a second company of that which had already been going on for three years while the employee in question was working for the prior owner. The telling of the tale consumed 805 pages of written record in the district court. Obviously, we must condense to the bare essentials those facts which the jury could have believed in arriving at its verdict.

Thus condensed, this is what happened: In 1956, Ft. Wayne Corrugated Paper Company, with headquarters in Ft. Wayne, Indiana, was engaged in the manufacture and sale of corrugated paperboard and cartons. It wanted and needed more and better business, particularly at its mill in McKee's Rocks, Pennsylvania, usually referred to as its Pittsburgh division. Robert M. Jones was manager at McKee's Rocks and had been in that capacity since 1950. Prior to that time, he had been sales manager for Ft. Wayne in the Pittsburgh division.

The Anchor Hocking Glass Company, with general offices located in Lancaster, Ohio, was a heavy consumer of cardboard boxes. Ft. Wayne had not done business with Anchor Hocking for about eighteen years. These companies had once been involved in litigation, which ended their business relationship.

In the first part of 1956, Jones went to the president of Ft. Wayne, who had served in that capacity since 1942, with a plan by which he thought a highly advantageous contract could be secured from Anchor Hocking for the purchase of products manufactured at McKee's Rocks. At this point Paul Dickmeyer was vice president and treasurer of Ft. Wayne, immediately answerable to the president, and was also the immediate superior of Jones. Jones told the president that in order to get the business from Anchor Hocking "a commission would have to be paid on this contract". This was positively

contrary to company policy, as it maintained its own salesmen. At the outset, Jones suggested that "we pay it and pass it under the table". The president promptly rejected this but did agree to pay the commission if Jones could "figure out a way to do it". Jones then conceived the idea of setting up a fictitious sales agency, identified only as the Box Sales Agency, Post Office Box 145, Lancaster, Ohio, *being the same city in which Anchor Hocking maintained its headquarters.* The president instructed Dickmeyer to have the plan checked out with company accountants. The report was satisfactory, the plan was approved, and the extremely valuable new business was obtained in the form of a two year contract. No officer or employee of Ft. Wayne except Jones had anything to do with acquiring or negotiating the contract. The president remarked that, "this is better than any glass business we have. How in the world do you work it?" Jones answered, "you know there is something we will have to come up with". Except for the identity of the actual recipient of the commissions, the arrangement involving the fictitious sales agency was explained to the president. As to who constituted the fictitious agency, and as to who was really getting the money, the president said that he did not want to know anything about it, and his wishes were obeyed. When the first contract came to expiration date in 1958, Jones, and Jones alone, then negotiated and obtained a new contract, known in the trade as an "evergreen contract", for two years certain and thereafter to be terminated only upon ninety days notice by either party. But at that time Jones informed the president that the commission theretofore paid would have to be raised to four per cent. With a minimum of protest and with no explanation required, the raise was agreed to.

The instant suit was brought by St. Joe on account of that same commission arrangement, which it unabatedly and un-

interruptedly continued after it took over, the circumstances of which will now be related.

On June 15, 1959, St. Joe Paper Company, plaintiff-appellant, acquired, along with other property, the McKee's Rocks mill. It retained Dickmeyer as the immediate superior of Jones, and Jones was continued in his same position as manager. Dickmeyer had known, from the very beginning, of the existence of the commission arrangment. Like the president of Ft. Wayne, he had not known who was actually or ultimately getting the money.

We think the proof furnished ample evidence from which the jury could have believed, as its verdict indicates it did believe, that St. Joe almost immediately knew as much about this fictitious sales agency arrangement as its predecessor had known.

Before the new company took over, its comptroller audited the books of Ft. Wayne. He was told by the president of the prior company about the payment of the commissions to Box Sales Agency. The contract with Anchor Hocking was described. As to the payment of the commission, at various points in the conversation with the comptroller the president said that "there was something special about this * * * the terms weren't written in the contract * * * but a commission was being paid for the business".

On the day St. Joe took over, Dickmeyer told its president and vice president what he knew about the commission situation, including the original proposition that payment be made under the table. He told these new officers that it was *"a fictitious set up* that we have established to pay. We are charging a commission on the business. It is holding the business for us. It is being used . . . to maintain the business . . . I don't like it, but I want to know whether you want

to continue it". The President of St. Joe then and there directed that the commission payments be continued. Dickmeyer went to Pittsburgh and informed Jones of this decision.

This is in stark contrast with the undisputed fact that anytime it had wished to do so St. Joe, upon perfunctory inquiry, could have found out that Box Sales Agency had no office, had no telephone, had no known principals, and had no correspondence with either the sellers or the buyers here involved.

All of the foregoing, of course, transpired before Hartford issued the first policy dated August 5, 1959.

Some two or three months after St. Joe took over, Jones spoke with one of its executives about the possibility of acquiring some new business from Anchor Hocking for another mill owned by St. Joe but not in Jones' territory. The executive was told that if St. Joe wanted this business it would have to pay the same 4% commission. The matter was settled by direction of a vice president to "take the business and pay the commission".

Within a few months after St. Joe became the new owner, at least before January 1, 1960, officers of the new owner began to wonder whether Box Sales Agency might not be a set up by which Anchor Hocking was getting a kick-back in the form of reduced cost of merchandise or else some of its employees might be using the power of his office for personal benefit. Attorneys were consulted and Dickmeyer was sent personally to Pittsburgh to obtain a letter from Jones, the essential contents of which he, in effect, dictated. Dickmeyer told Jones "that they were afraid of a - - - they were [in] some doubt as to whether there would be a possible Robinson-Patman [15 U.S.C.A., Section 13] violation and they needed this letter, and he told me what he would like me to put in

the letter in my own words and construction". Dickmeyer told Jones to put the letter in his own handwriting, not to have it typed by a secretary, and that he did not want anybody in the office to know about it. On January 21, 1960, the letter was written.[1]

The letter was soon delivered into the hands of the company president, who directed that it be locked up and preserved in a safe in his office. The commission checks continued to flow to Box Sales Agency, with no questions asked.

In late 1960, things got really gummed up. Through the inadvertency of someone, two of the commission checks were mailed directly to personnel in the purchasing office of Anchor Hocking. Jones retrieved the checks and wrote the company treasurer to get the checks in the future and send them directly to the post office box in Lancaster. The receipt of this letter caused a high level company conference in which it was decided to find out who had actually been receiving the commissions.

A routine bank inquiry speedily turned up the fact that Jones, who had set up the Sales Agency arrangement, was

---

1 "January 21, 1960
Mr. R. E. Bartlett,
Vice President, St. Joe Paper Company
Barnett Bank Building
Jacksonville, Florida
Dear Mr. Bartlett:

At the request of Mr. Dickmeyer I have been asked to write and give you information concerning the officials of Box Sales Agency.

In my relationship with the Box Sales Agency, I have not, up until this time, personally met any official or representative that I knew to be part of or member of Box Sales Agency. Nor do I know that any officer or member of Box Sales Agency is an officer or employee of Anchor-Hocking Glass Corp.

The dealings which I have had with Box Sales Agency have been in an anonymous manner and have been necessary in order to obtain certain sales advantages in my dealings with Anchor-Hocking Glass Corp. The commissions have been paid to help obtain these sales advantages.

Very truly yours,
ROBERT M. JONES"

the man who had deposited all commission checks in a bank in Ohio and thereafter withdrew the funds and deposited them to his personal bank account in Pennsylvania. The proof showed that Jones paid personal income tax on the money, and he testified at the trial, without contradiction, that he used the money in playing customer gin rummy, where the customer wins, and in lavish entertainment of high customer officials.

After St. Joe made this discovery, two additional commission checks were sent and cashed. In less than two months, however, Jones was discharged and this suit was brought.

III

The insurers contend that the new company deliberately continued to pay the commissions in order to get the business, and fully got what it paid for, therefore it suffered no loss. At the same time, however, as the district judge so ably charged below, an employee who occupies a position of trust and confidence is obligated to exercise the utmost good faith in all matters which are entrusted to him by his employer, during which time he may not make a secret profit out of transactions in which he acts for his employer. The jury was specifically charged that if such an employee wilfully violates such a position of trust and confidence, for example by concealments or misrepresentations which are not known to the employer, then such violation shows a want of integrity, which may be regarded as a fraudulent or dishonest act [within the meaning of the insurance policies here sued upon].

These charges correctly state the law. While it may be that the jury believed the testimony of Jones that he made no secret profit from these transactions, the proof does show beyond dispute that Jones never at any time before February,

1961, revealed that he got the commission checks and ultimately deposited the proceeds in his personal bank account. We, therefore, expressly decline to affirm the judgment on this ground.

The jury was further charged, however, as follows:

> "The defendants further allege that before the relevant date of coverage of the insurance policies, plaintiff, or one or more of its officers not in collusion with Jones, had knowledge or information of the acts of Jones on which plaintiff bases its claim. Such knowledge or information would bar recovery under either of the policies."

This charge was necessitated by the policy language set out in the beginning of this opinion. Without further restatement or analysis, we simply hold that the proof herein set forth was more than ample to support a finding by the jury that prior to the inception of these policies, St. Joe Paper Company came into the possession of both information and knowledge that Jones had committed a dishonesty which, under the recited terms of the policies, barred recovery.

The trial court, therefore, committed no error in denying motions by the plaintiff-appellant for a directed verdict, for judgment notwithstanding the verdict, and for a new trial.

Appellant assigns error also in the giving of the following instruction:

> "Therefore, if you find from the evidence that prior to August 5, 1960, St. Joe Paper Company knew through one or more of its officers or one or more of its officers were informed that Box Sales Agency performed no services in connection with the

sale of containers from St. Joe Paper Company to Anchor Hocking Glass Corporation, and that all or a part of the commissions were being transmitted to Jones or to Anchor Hocking Glass Corporation or to persons connected with Anchor Hocking Glass Corporation, and that, notwithstanding such knowledge or information, St. Joe Paper Company continued to pay such commissions, then you must return a verdict for defendants."

This instruction comprehends a correct statement of the law.

"If, with the consent of the employer, expressed or implied from the course of dealings between it and the employee, the latter used or retained monies, charging itself with them, it would be no obligation covered by the insurance or indemnity of the (surety) company", *Monongahela Coal Co., v. Fidelity and Deposit Co.*, 5 Cir., 1899, 94 F. 732.

Undisputed evidence shows that both companies not only consented to the Box Sales Agency arrangement but went out of their way to avoid finding out how the money was used or who was actually getting it. They knew that Jones, and Jones alone, set up the arrangement and handled all contacts with Anchor Hocking. Jones' testimony that the money went to Anchor Hocking officials in the form of gin rummy and lavish entertainment, whether actually true or not, stands undisputed in this record. The testimony showed that St. Joe was told from the outset that Jones set up Box Sales and that it was fictitious. It necessarily followed that either Jones was keeping the commissions or transmitting them in some manner to Anchor Hocking or some of its officers. St. Joe was getting the business. Flying in the face of repeated warnings, it studiously chose not to learn the answer until February, 1961.

There would have been ample ground for a jury finding that the company impliedly consented to whatever was being done with the funds. Since there was a general verdict we do not know what, if anything, the jury found on this particular issue. The law and the evidence justified the granting of the instruction and we can see no basis for holding it to have been reversible error. We note that prior to trial the court struck certain defenses involving this same issue. This does not change the fact that the evidence as adduced by the parties, under the supervision of the court, developed this issue and the defendants were entitled to have it submitted to the jury.

We have carefully considered the other contentions of appellant as to the reception of proof, instructions, and like matters, in which we find no cause for reversal.

The Judgement of the District Court is AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22129

ST. JOE PAPER COMPANY,

Appellant.

versus

HARTFORD ACCIDENT AND INDEMNITY COMPANY, ET AL.

Appellees.

Appeal from the United States District Court for the Middle District of Florida.

(March 28, 1967.)

ON REHEARING

Before PHILLIPS,* RIVES and COLEMAN, Circuit Judges.

PER CURIAM: The appellant's petition for rehearing was granted and the cause restored to the calendar for reargument and resubmission. Now after consideration of the additional briefs and argument, the opinion filed in this case on May 3, 1966, reported in 359 F.2d at 579, et seq. is amended as follows:

(A) The following passages in the opinion are stricken:

---

* Of the Tenth Circuit, sitting by designation

(1) From the fourth paragraph of Part II:

"The president remarked that, 'this is better than any glass business we have. How in the world do you work it?' Jones answered, 'you know there is something we will have to come up with.' Except for the identity of the actual recipient of the commissions, the arrangement involving the fictitious sales agency was explained to the president. As to who constituted the fictitious agency, and as to who was really getting the money, the president said that he did not want to know anything about it, and his wishes were obeyed."

(2) From the ninth paragraph of Part II:

"He told these new officers that it was *'a fictitious set up* that we have established to pay. We are charging a commission on the business. It is holding the business for us. It is being used * * * to maintain the business. * * * I don't like it, but I want to know whether you want to continue it'."

(3) From the long paragraph which is the ninth paragraph of Part III and the third paragraph from the end of the opinion:

"The testimony showed that St. Joe was told from the outset that Jones set up Box Sales and that it was fictitious."

(B) The date "August 5, 1960" included in the quoted instruction in the sixth paragraph of Part III is changed to "August 5, 1959."

(C) There is also stricken the seventh paragraph of Part III, which consists of a single sentence reading: "This in-

struction comprehends a correct statement of the law." In lieu of that sentence, there is inserted the following:

It is not necessary to determine whether this instruction is a correct statement of the law as against any and all conceivable grounds of objection, but only whether one or more of the grounds of objection distinctly stated by the plaintiff in the district court, appellant here, should have been sustained. Rule 51, Fed. R. Civ. P. The grounds stated to the district court by the plaintiff-appellant are set forth in the margin.[1] The charge related to St. Joe Paper Company's knowledge or information prior to August 5, 1959. The fact that all of the commissions were in fact transmitted to Jones and none to Anchor Hocking or to persons connected with Anchor Hocking was not material to St. Joe's knowledge or information prior to August 5, 1959 that the commissions were being transmitted to one or the other of the three.[2] The charge was not erroneous upon any of the grounds of objection stated by the plaintiff-appellant. There was evidence from which the jury could reasonably infer that St. Joe knew

---

1 "We object to that charge * * * upon the ground that it tells the jury that if the plaintiff had knowledge that the commissions paid to Box Sales Agency, or part of them, were going to Anchor Hocking or officials of Anchor Hocking, that this would be a defense for the defendants, upon the ground that there is no evidence that the commissions, or any part of them, went to Anchor Hocking or any officials of Anchor Hocking.

"The evidence conclusively shows that all of the commissions went to Robert M Jones.

"The matters referred to are the same matters that Your Honor has struck as a defense to the case. They are in part in the evidence that Your Honor has excluded in the case on the suspicion that such might be happening to the commissions.

"It is of course impossible for the plaintiff to have knowledge that something was happening which in fact was not happening; and it is of course impossible for the plaintiff to have information that something was happening which was not in fact happening, because information is nothing more than knowledge communicated to one by another."

2 That is to Jones or to Anchor Hocking, or to persons connected with Anchor Hocking.

or had information that Jones was keeping the commissions paid to Box Sales Agency, or that they were being transmitted by him to Anchor Hocking or persons connected with it. Hence, the factual situations covered by the instruction were not purely hypothetical, but were based upon reasonable inferences which the jury might have drawn from proven facts.

The said opinion filed on May 3, 1966 as thus modified is readopted as the opinion on rehearing, and the judgment is

AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22129

ST. JOE PAPER COMPANY,

Appellant,

versus

HARTFORD ACCIDENT AND INDEMNITY COMPANY, ET AL.,

Appellees.

Appeal from the United States District Court for the Middle District of Florida.

(April 18, 1967.)

ON PETITION FOR FURTHER REHEARING

Before PHILLIPS,* RIVES and COLEMAN, Circuit Judges.

PER CURIAM: The appellant calls attention that in addition to the grounds of objection[1] to the instruction[2] made following the charge, a further ground had been assigned

---

* Of the Tenth Circuit, sitting by designation.

[1] Such grounds of objection are quoted in footnote 1 to our opinion on rehearing.

[2] The instruction is quoted in our original opinion.

earlier in a conference on proposed charges,[3] which should be considered.[4]

We agree, but hold that the instruction was not objectionable upon that ground. In our original opinion we quoted the provisions of the policies which preclude coverage after the insured or an officer of the insured not in collusion with the employee discovers or has knowledge or information "that such Employee has committed *any* fraudulent or dishonest act in the service of the Insured or otherwise, *whether such act be committed before or after the date of the employment by the Insured,*" or again, "of *any* fraudulent or dishonest act on the part of such Employee." (Emphasis added.) Those provisions are much broader than somewhat similar provisions which have been construed to limit the exclusion to fraudulent or dishonest acts which would give rise to a claim under the policy.[5] The exclusion of coverage after knowledge that the employee has committed *any* fraudulent or dishonest act is a reasonable and valid provision.[6] The present policies clearly and unambiguously so provide. The petition for further rehearing is

DENIED.

---

3 "MR. DITMAR [Plaintiff's counsel]:
"If I may add to that, the cases establish that the only sort of fraudulent and dishonest acts, knowledge or information of which can terminate the coverage of the policy, is a fraudulent or dishonest act that would itself have given rise to a claim under the policy. That is why this Anchor Hocking thing is irrelevant, we believe."

4 Under our holding in Williams v. Hennessey, 5th Cir. 1964, 328 F.2d 490, 491.

5 For example, see provisions referred to in Bank of Erie Trust Co. v. Employers' Liab. Assur. Corp., Pa. 1936, 185 Atl. 224, 225; Bank of Commerce & Trust Co. v. Union Indemnity Co., La. 1932, 142 So. 156, 157; Fidelity & Deposit Co. v. People's Bank, 4th Cir. 1934, 72 F.2d 932, 936-37; 45 C.J.S. 604, Insurance §666, p. 849, Insurance §801.

6 J. S. Fraering, Inc. v. Employers Mutual Liability Ins. Co., 5th Cir. 1957, 242 F.2d 609.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 22129

D. C. Docket No. 63-97-Civil Action

ST. JOE PAPER COMPANY,

Appellant,

versus

HARTFORD ACCIDENT AND INDEMNITY COMPANY, ET AL.,

Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before PHILLIPS,* RIVES and COLEMAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

*Of the Tenth Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion of this Court filed on May 3, 1966 as modified by the opinion on rehearing this day rendered is readopted as the opinion on rehearing, and the judgment is affirmed;

It is further ordered and adjudged that the appellant, St. Joe Paper Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

March 28, 1967

Issued as Mandate: April 26, 1967

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 8 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 364

ST. JOE PAPER COMPANY,

Petitioner,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondents.

BRIEF FOR RESPONDENT HARTFORD ACCIDENT AND INDEMNITY COMPANY, A CORPORATION, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

CHARLES COOK HOWELL, JR.,
Attorney for Respondent Hartford Accident and Indemnity Company, a corporation
934 Florida National Bank Building
Jacksonville, Florida 32202

SUBJECT INDEX.

TOPIC	PAGE
Index to Authorities Cited	ii
The Argument	1
Conclusion	3
Certificate of Service	3

Index to Authorities Cited

	PAGE
Gentle Talking Pictures Corporation vs. *Western Electric Co.*, 304 US 175, 58 S. Ct. 849, 82 L. ed. 1273, 1275; aff. 59 S. Ct. 116, 305 US 124, 83 L. ed. 81; reh. den. 59 S. Ct. 355, 305 US 675, 83 L. ed. 437	2
Pierson vs. *Ray, et al.*, US , 18 L. ed. 2d 288, 297, 87 S. Ct. , decided April 11, 1967, note 12	2
Evelyn Rice vs. *Sioux City Memorial Park Cemetery, Inc., et al.*, 349 US 70, 99 L. ed. 897, 904, 75 S. Ct. 614	2
Supreme Court Rule 19	1
Supreme Court Rule 24	1
Supreme Court Rule 40	1

Respondent Hartford Accident and Indemnity Company, a corporation, under Rules 24 and 40 of this Honorable Court, respectfully submits that although it is fully aware that the reasons set forth in Rule 19 justifying the grant of a writ of certiorari to review a decision of a Circuit Court of Appeals are to be regarded as "neither controlling nor fully measuring the Court's discretion", no writ should issue here because

The Argument.

1. No case has been cited by Petitioner, and we have found none, standing authority for the proposition that "the giving of an instruction on an issue not made by the pleadings, not tried by the implied consent of the parties and erroneous as a matter of law" (page 8 of the petition), is such a departure "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 19 1(b)*

---

* Indeed; for the reasons given and upon the strength of the authorities cited by the Circuit Court of Appeals, it is perfectly patent, upon remembering Rule 15(b) of the Federal Rules of Civil Procedure and the pages of the record now to be cited, that the matter of which Petitioner complains *was* "tried by . . . implied consent of the parties", that failure "to amend . . . (did) not affect the result of the trial of these issues", and that the instruction was *not* erroneous as a matter of law. (R. 580, 596, 598, 608, 612, 618-619, 621-622, 629-630, 632-634, 635-637, 639-640).

As well put by the Court of Appeals (the petition, page 20); "We note that prior to trial the court struck certain defenses involving this same issue. This does not change the fact that the evidence as adduced by the parties under the supervision of the court, developed this issue and the Defendants were entitled to have it submitted to the jury." (Because, inter alia, *a* "fraudulent or dishonest act" by Jones, knowledge of which the jury could have found St. Joe had, would *still* be present.)

After a certain portion of the matter contained in the just cited pages of the transcript of the record—all injected in the case by Petitioner itself—had been developed, the trial judge observed that "the jury is, I am sure, sensitive to the questions and to the answers given, and it will be completely up to the jury to evaluate the testimony." (R. 642-643).

(a) Actually, in order to determine whether, as Petitioner charges, the "issue" of which Petitioner complains was or was not "tried by the implied consent of the parties", resort to the evidence would be necessary; and "Granting of the writ would not be warranted merely to review the evidence. . . ." *Gentle Talking Pictures Corporation* vs. *Western Electric Co.*, 304 US 175, 58 S. Ct. 849, 82 L. ed. 1273, 1275; aff. 59 S. Ct. 116, 305 US 124, 83 L. ed. 81; reh. den. 59 S. Ct. 355, 305 US 675, 83 L. ed. 437.

(b) Petitioner further asserts that the instruction was "erroneous as a matter of law." (the petition page 8) Here there is no federal question; no decisional conflict among courts of appeals; no lower court ruling upon an important state or territorial question in any way conflicting with applicable state or territorial law. Therefore

> "We do not ordinarily review the holding of a court of appeals on a matter of state law, and we find no reason for departing from that tradition in this case."
>
> *Pierson vs. Ray, et al.*, US , 18 L. ed. 2d 288, 297, 87 S. Ct. , decided April 11, 1967, note 12.

2. Even a cursory reading of the petition recalls to mind the controlling principals of *Evelyn Rice vs. Sioux City Memorial Park Cemetery, Inc., et al.*, 349 US 70, 99 L. ed. 897, 904, 75 S. Ct. 614:

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principals, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

CONCLUSION.

It is deferentially urged that the instant petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

CHARLES COOK HOWELL, JR.
934 Florida National Bank Building
Jacksonville, Florida
Attorney for Respondent Hartford
Accident and Indemnity Company

Certificate of Service.

I do hereby certify that on August 11, 1967, I deposited a copy of the foregoing brief in a United States mail box, with first class postage prepaid, addressed to counsel of record at their post office address; i. e., to Messrs. Chester Bedell and C. Harris Dittmar, at 1520 Barnett Bank Building, Jacksonville, Florida, 32202.

CHARLES COOK HOWELL, JR.
Attorney

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
AUG 14 1967
JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1967.

No. 364

ST. JOE PAPER COMPANY,

Petitioner,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondents.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Earl B. Hadlow
Attorney for Respondent
The Fidelity and Casualty
Company of New York
Post Office Box 4099
Jacksonville, Florida 32201

INDEX

	Page
Questions Presented	2
Statement of the Case	2
Argument	5
Conclusion	6

CITATIONS

Gallon v. Lloyd-Thomas Co., (8th Cir. 1959) 264 F.2d 821, 823	5
Standard Title Insurance Company v. Roberts, (8th Cir. 1965), 349 F.2d 613, 620-21	6

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____

ST. JOE PAPER COMPANY,

Petitioner,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondents.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This brief is filed by respondent The Fidelity and Casualty Company of New York in opposition to the petition of St. Joe Paper Company for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review that court's judgment entered in this case on April 18, 1967. The grounds upon which this Court's jurisdiction is sought to be invoked are set out in petitioner's

brief and will not be repeated here. However, this respondent's conception of the questions presented differs from petitioner's and the questions will therefore be restated.

QUESTIONS PRESENTED

1. Whether the Trial Court abused the discretion granted it by Rule 15(b), Federal Rules of Civil Procedure, to permit the trial of an issue not raised by the pleadings but properly developed through evidence received without objection.

2. Whether the decision of the United States Court of Appeals for the Fifth Circuit, approving the trial of such an issue, amounts to an erroneous interpretation of Rule 15(b) which should be corrected by this Court in the exercise of its power to supervise the construction and operation of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The petitioner, St. Joe Paper Company, invoking diversity of citizenship jurisdiction, filed suit in the United States District Court for the Middle District of Florida against the respondent insurance companies to recover over $86,000 St. Joe had purportedly lost because of the "fraudulent or dishonest" acts of Robert M. Jones, one of its employees covered by the fidelity insurance in force with respondents.

St. Joe's case in chief consisted of a stipulation of facts and certain supporting documents (R. 116-138) which established these facts:

On June 15, 1959, St. Joe purchased Fort Wayne Corrugated Paper Company's container plants located in Pittsburg, Penn-

sylvania, Hartford City, Indiana, Rochester, New York, and Chicago. With the purchase, St. Joe acquired the right to sell to Fort Wayne's customers, all users of cardboard boxes, and it also hired some of Fort Wayne's employees, such as Robert M. Jones, the manager of the Pittsburgh plant, and Paul Dickmeyer, the company's vice-president and treasurer and Jones' immediate superior. In the change over, Jones remained in charge of the Pittsburgh operation, including the plant's production and sales, and Dickmeyer became General Manager of St. Joe's Fort Wayne Division, with supervisory authority over the newly acquired plants.

One of the customers St. Joe acquired with the purchase was Anchor Hocking Glass Corporation, which had been under contract to buy containers from the Pittsburgh plant. On all sales to Anchor Hocking, Fort Wayne had paid a four per cent commission to Box Sales Agency at a post office box in Lancaster, Ohio, where Anchor Hocking had its general offices. After the acquisition, Anchor Hocking continued to do business with the Pittsburgh plant, and St. Joe adopted Fort Wayne's practice of sending the four per cent commission, in the form of monthly checks, to the post office box.

Box Sales Agency had "no officers, representatives, employees or members" (R. 138). Jones, in fact, received the commission checks and deposited them to a "Box Sales Agency" checking account at the Lancaster National Bank; and then he transmitted the funds to his personal bank account in Pittsburgh. The money helped Jones "obtain certain sales advantages" in his dealings with Anchor Hocking. (R. 131). It was the amount of these commissions paid to "Box Sales Agency" that St. Joe sought to recover against respondents. (Respondent Hartford's fidelity insurance was in force from the time of the acquisition until August 5, 1960, at which

time respondent Fidelity and Casualty wrote the fidelity bond covering the employees, including Jones, at the Pittsburgh plant. Jones was insured under that coverage until the spring of 1961, when St. Joe contends it "discovered" the loss in question.)

The respondents contended that St. Joe could not recover its alleged loss because it had knowledge or information that Jones had committed a fraudulent or dishonest act within the meaning of certain provisions of the policies which automatically terminated the fidelity coverage once St. Joe acquired such knowledge or information about one of its insured employees (R. 22-33, 115).

At the pretrial conference the Court entered an order (R. 74) striking certain defenses which respondents had addressed to the issue of "knowledge or information" (R. 22-33). In essence, these defenses asserted that St. Joe, at the time it acquired the box plants, had knowledge or information that the substantial Anchor Hocking account had been obtained by Jones, for Fort Wayne's Pittsburgh plant, because Jones and the Fort Wayne officials, including Paul Dickmeyer, were willing to make a "kick back" to Anchor Hocking or its purchasing department in the form of the four per cent commission checks mailed to the post office box in Lancaster. In being a party to the transaction, Jones had committed a "fraudulent or dishonest" act because the "kick back" was unlawful, amounting to "commercial bribery" or a violation of the Robinson-Patman Act, Title 15, United States Code, Sections 13 and 13a (R. 31).

The stricken defenses further asserted that St. Joe, after it received the information, "became concerned that it might be subjected to criminal or civil liability to the extent that it participated in the payment of such commissions," (R. 31-32)

and that an investigation to disclose the principals of Box Sales Agency might lead to the loss of the account. To keep the business St. Joe took no action, continued to pay the commissions and thus waived its right to proceed against respondents under the fidelity coverage.

Respondent's case was presented through the testimony of Fort Wayne's president, Harold Treen, Paul Dickmeyer (Jones' superior who went to St. Joe in the change over), Jones, himself, and St. Joe's officers, who, by the time of the trial, were no longer connected with the company. Their testimony authorized the jury to conclude that it was known by St. Joe from the outset that Box Sales Agency was a fictitious creation, put together by Jones, with Fort Wayne's blessings, to get and to keep the lucrative Anchor Hocking account. The jury was also entitled to find that St. Joe made a business decision not to investigate the situation to determine whether Anchor Hocking, or someone close to it, or Jones was picking up the checks at the post office box. And as the Court of Appeals found below, the jury was entitled to be charged that St. Joe could not recover if it had knowledge or information that Anchor Hocking or persons connected with Anchor Hocking were receiving all or a part of the commissions.

ARGUMENT

As St. Joe has conceded in its petitioner's brief, under Rule 15(b) the jury is entitled to consider an issue, not raised by the pleadings, if it is tried by the implied consent of the parties. In fact, the trial judge has sufficient latitude, in determining whether such an issue should be submitted, that his decision on the matter cannot be reversed unless it amounts to an abuse of discretion. *Gallon v. Lloyd-Thomas Co.*, (8th

Cir. 1959), 264 F.2d 821, 823. It would therefore appear that St. Joe's petition should not be granted unless it can be demonstrated, initially, that the trial of the "kick back" issue amounted to an abuse of discretion, and, further, that the abuse was of such magnitude that this Court should intervene to give definitive treatment to the rule.

We submit that it was not an abuse of discretion to submit the issue to the jury. Petitioner's contention that it was thus deprived of notice that payments to Anchor Hocking or its personnel might bar recovery is without merit. It was St. Joe's counsel, not respondents', who, on cross examination, interrogated Jones about the Box Sales Agency - Anchor Hocking arrangement he had set up while employed with Fort Wayne (R. 583-598, 636-643). On subsequent re-direct examination of Jones, he fully explained the transaction without meritorious objection from St. Joe's counsel (R. 624-636). The evidence thus initiated by St. Joe was that Jones had created a method of passing money under the table where it would do the most good; and it was going either to Anchor Hocking, its purchasing authorities, or Jones, as the jury was permitted to find.

As for Robinson-Patman, St. Joe, itself, injected its possible violation into the case. In presenting the stipulation of fact to the jury in its case in chief, St. Joe introduced a letter it had requested Jones to write to Robert Bartlett, its vice-president (R. 130-131). It was later developed by respondents that St. Joe wanted the letter, for whatever protection it might afford it, because it was concerned that the commissions were nothing more than unlawful kickbacks in violation of the Robinson-Patman Act (R. 360-367, 572-577). In *Standard Title Insurance Company v. Roberts*, (8th Cir. 1965), 349 F.2d 613, 620-21, the Court acknowledged the proposition that,

where a party takes affirmative action, during the trial, to introduce evidence on an issue not expressly raised by the pleadings, he cannot later contest the trial of the issue. In this case, if, in fact, the jury instruction complained of was not addressed to an issue framed by the pleadings, then it was clearly a permissible charge on the evidence adduced in part by St. Joe.

For the foregoing reasons, we submit that it has not been made clear by petitioner that the trial judge abused the discretion given him under Rule 15(b). Even if there was an abuse, there has been no showing that the trial judge gave the rule a construction which should be set aside by this Court.

CONCLUSION

The decision of the Court of Appeals should not be disturbed, and St. Joe's petition should be denied.

Respectfully submitted,

Earl B. Hadlow

EARL B. HADLOW
Attorney for Respondent
The Fidelity and Casualty
Company of New York

LIBRARY
SUPREME COURT, U. S.

FILED
SEP 28 196
JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 364

ST. JOE PAPER COMPANY, a corporation,

Petitioner,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, corporation, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondents.

REPLY BRIEF FOR PETITIONER

Chester Bedell
C. Harris Dittmar
Attorneys for Petitioner
1520 Barnett Bank Building
Jacksonville, Florida 32202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 364

ST. JOE PAPER COMPANY, a corporation,

Petitioner,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, corporation, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondents.

REPLY BRIEF FOR PETITIONER

The question raised by the petition for certiorari is whether the submission to the jury of an issue not made by the pleadings and not tried by the express or implied consent of the parties constitutes such a departure from the accepted and usual course of judicial proceedings as to require this Court to exercise its power of supervision. The respondents, rather than meeting this question head-on, have resorted to the diversionary tactics which have served them so well throughout this litigation.

Thus, the respondents contend in their respective briefs that some of the evidence introduced at the trial was relevant to the issue of whether petitioner had knowledge or information "that all or part of the commissions were being

transmitted to . . . Anchor Hocking Glass Corporation or persons connected with Anchor Hocking Glass Corporation . . . "* and that the only way this Court can determine whether that evidence was received in such a manner as to give rise to an implied consent by the parties to a trial of that issue is for this Court to review the evidence, a task which this Court does not ordinarily undertake.

But, no review of the evidence by this Court is, in fact, necessary. Throughout all stages of this litigation, the petitioner's basic position has been that it is entitled to recover from the insurance companies because its employee, Jones, whose fidelity the insurance companies assured, had caused petitioner to pay its funds to him by representing to petitioner that the payments were being made to a third party as a necessary business expense. The respondents have continually countered this charge with a contention that petitioner should not recover because it *thought* or *believed* that the payments were being made to a third party in violation of the Robinson-Patman Act. When the respondents first boldly and plainly stated this contention,** its insufficiency as a defense was readily recognized and the defenses asserting that contention were stricken (R. 75).

The striking of the defenses based on the contention that plaintiff thought or believed that payments were being made in violation of the Robinson-Patman Act should have put an end to that bugaboo, as indeed the trial judge indicated it had.*** Thereafter, no evidence was submitted by either party

---

* The District Court's erroneous instruction (R. 782).

** On the occasion of their filing amended answers asserting the contention as affirmative defenses.

*** "Robinson-Patman and all that went out the window . . . As a defense." (R. 82); "Robinson-Patman is out. That is not getting in at all." (R. 84).

on the issue tendered by the stricken defenses. The petitioner, however, being faced with the contention raised by the remaining defenses that it knew or had information of Jones' fraudulent and dishonest acts, did elicit admissions from Jones that he had written documents and made statements for the purpose of concealing the fact that the commission payments were coming to him and for the purpose of disguising the identity of Box Sales Agency as his alter ego. And Jones, in making such admissions, did contend that the documents written by him and the statements made by him were desired and accepted by the petitioner because petitioner thought the payments were being made in violation of the Robinson-Patman Act and wanted Jones to disguise and conceal the identity of Box Sales Agency. In other words, Jones said, "I lied to my employer, but this was all right because my employer couldn't face what it thought to be the 'truth' (which was not, in fact, the truth) and hoped I would lie."

Because Jones persisted in injecting this psuedo-justification into his testimony although it had been rejected as a defense, harmful error resulted from the trial judge's submitting to the jury, as a defense to the action, the issue of whether petitioner had knowledge or information that some of the commission payments were going to Anchor Hocking or persons connected with Anchor Hocking. And, it is this pseudo-justification by Jones which must be the basis for the Court of Appeals' holding "that the evidence as adduced by the parties, under the supervision of the court, developed this issue . . . ." (359 F.2d at 584, Appendix to Petition, p. 20). It is the same psuedo-justification by Jones, and nothing else, which respondents refer to in their briefs in contending that there was evidence relevant to this issue. And, because this psuedo-justification was asserted by Jones in his answers given during cross-examination by petitioner, re-

spondents contend that the issue was tried with the implied consent of the parties.

If the Court agrees with the trial judge's ruling that the psuedo-justification is not a defense to the petitioner's claim, it necessarily follows that this Court must find that the trial judge's submission to the jury of an issue based on that psuedo-justification was such a departure from the accepted and usual course of judicial proceedings as to require this Court to exercise its power of supervision. In effect, the trial judge permitted the jury to base a verdict for the defendant on an issue which could not constitute a defense to the plaintiff's claim. No review of the evidence is necessary. The confusion and inconsistencies apparent in the Court of Appeals' three opinions amply demonstrate that this was a departure from the accepted and usual course of judicial proceedings which cannot be rationalized and justified and which this Court must rectify.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

.....

(Chester Bedell)

.....

(C. Harris Dittmar)

Attorneys for Petitioner.